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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

O'DELL MARSHALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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FILED

MAR 13 1968

WM. B. LUCK, CLERK

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APPELLEE'S BRIEF

I

STATEMENT OF JURISDICTION

On January 19, 1966, appellant was indicted, in three counts, by the Federal Grand Jury for the Southern District of California, Central Division, for transporting and selling marihuana on December 2, 1965, in violation of Title 21, United States Code, Section 176a, and transferring marihuana without obtaining an order form in violation of Title 26, United States Code, Section 4742(a) [C. T. 2]. ^{1/} Following a trial by jury before the Honorable Irving Hill,

^{1/} "C. T. " refers to the Clerk's Transcript.

United States District Judge, from March 21, 1966, to March 22, 1966, appellant was found guilty of all counts of the indictment [C. T. 52].

Appellant was convicted and sentenced on April 18, 1966, to the custody of the Attorney General for seven years on each count, the sentences to begin and run concurrently [C. T. 55].

Appellant filed, on April 18, 1966, a timely Notice of Appeal [C. T. 57].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 176a.

This Court has jurisdiction to review the judgment pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 21, United States Code, §176a provides as follows:

"Notwithstanding any other provision of law, whoever knowingly, with intent to defraud the United States, imports or brings into the United States marijuana contrary to law, or smuggles or clandestinely introduces into the United States marijuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marijuana after

being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marijuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marijuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

Title 26, United States Code, Section 4742(a) provides as follows:

"(a) General requirement. -- It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

III

QUESTIONS PRESENTED

1. Whether the use of a transmitting device by a party to a conversation requires the exclusion of evidence obtained when no objection is made in the trial court.

2. Whether Section 4742(a) of Title 26, United States Code, is unconstitutional as a deprivation of a man's right not to incriminate himself.

IV

STATEMENT OF FACTS

On December 2, 1965, at approximately 6 o'clock P. M., an informant met with two Agents of the Federal Bureau of Narcotics and two members of the Los Angeles Police Department [R. T. 18]. ^{2/} The informant was acting in such capacity as a volunteer, and not because of any arrest [R. T. 31]. At the time of meeting with the law enforcement personnel, the informant's car and person were searched for contraband and the search proved negative [R. T. 64]. Thereafter, the informant was given \$250 and a Fargo transmitter was affixed to his person [R. T. 64]. The Fargo worked [id.].

The informant, in his own vehicle, was followed to a location where he picked up one Sam Pastorello [R. T. 19, 65]. The two

^{2/} "R. T. " refers to the Reporter's Transcript.

then proceeded to 1320 South St. Andrews, in Los Angeles [R. T. 21]. Upon entering an apartment at said address, the informant was introduced to a Penny and the appellant, O'Dell Marshall [R. T. 21].

The informant told appellant he wanted to buy two kilograms of marihuana [R. T. 22]. The appellant stated it was not available in the apartment, and he would have to make a phone call [R. T. 39]. Appellant stated it would be \$115 per kilogram [R. T. 44].

During the aforementioned phase of the transaction, appellant was weighing and selling marihuana to a person other than the informant [R. T. 35, 38].

Following the initial phase, the informant left and met with Agent Charles D. Casey [R. T. 23]. After obtaining some beer, the informant returned to the aforementioned address on St. Andrews [R. T. 23]. After the informant returned, appellant told him to wait there until he called, and then Penny would tell the informant where to go [R. T. 23, 43]. Approximately an hour later, Penny received a call from the appellant, and the informant was given a piece of paper with the address 1803 South St. Andrews appearing thereon [R. T. 23]. The informant then proceeded to the 1803 address with Sam, was waived in by the appellant, and they went into the kitchen [R. T. 25]. In the kitchen the appellant handed the informant the subject marihuana (Exhibit 1) [R. T. 25], and appellant was handed the agreed \$230 [R. T. 26]. Following the transfer, appellant stated, "Hide them" [R. T. 48], and the informant was "rushed" out the back door [R. T. 26].

The marihuana sold by appellant was of Mexican origin [R. T. 13].

Agent Charles D. Casey, by the use of a receiver, overheard the conversations between appellant and the informant and, at the trial, corroborated the testimony of the informant [R. T. 64-68].

The appellant took the stand at trial and testified that he said, on December 2, 1965, that he would see if he could get some marihuana [R. T. 124]; that he called Penny from the 1803 address [R. T. 126-27]; that he was doing the informant "a favor" by giving him the "stuff" [R. T. 129].

V

ARGUMENT

- A. THERE WAS NO OBJECTION TO NOR ERROR IN THE ADMISSIBILITY OF AGENT CASEY'S TESTIMONY REGARDING WHAT HE HEARD BY MEANS OF A TRANSMITTER WILLINGLY CONCEALED ON THE PERSON OF A PARTY TO A CONVERSATION.
-

Appellant makes no reference to the Reporter's Transcript wherein objection was made to Agent Casey's relation of conversation heard over a radio receiver. There, also, was no such objection made at the trial level. A point not raised in the trial court may not be raised on appeal. Osborne v. United States, 371 F.2d 913 (9th Cir. 1967), cert. denied 387 U.S. 946; Bouchard v. United States, 344 F.2d 872 (9th Cir. 1965).

Assuming arguendo, that the point had been preserved for appeal, the use of a Fargo did not violate either the Fourth, Fifth or Sixth Amendment rights of appellant. Garrett v. United States, 382 F.2d 768 (9th Cir. 1967). The most recent word on the subject found by appellee appears in the concurring opinion of Justice White in Katz v. United States, ____ U.S. ____ (December 18, 1967). To quote Justice White:

" . . . When one man speaks to another he takes all the risks ordinarily inherent in so doing including the risk that the man to whom he speaks will make public what he has heard. The Fourth Amendment does not protect against unreliable (or law-abiding) associates. Hoffa v. United States, supra. It is but a logical and reasonable extension of this principle that a man takes the risk that his bearer, free to memorize what he hears for later verbatim repetitions, is instead recording it or transmitting it to another"

B. SECTION 4742(a), TITLE 26, UNITED STATES CODE, IS NOT UNCONSTITUTIONAL AS A DEPRIVATION OF THE RIGHT NOT TO INCRIMINATE ONE'S SELF.

Appellant, relying on the recent decisions of Marchetti v. United States, ____ U.S. ____, 36 L. W. 4143 (January 29, 1968); and Haynes v. United States, ____ U.S. ____, 36 L. W. 4164 (January 29, 1968), urges that Section 4742(a) of Title 26 is unconstitutional.

Initially, since the three sentences are to run concurrently, affirmance of the judgment on either count one or two would not require the consideration of appellant's second point.

The instant statute is distinguishable from those at issue in Marchetti and Haynes. Section 4742(a) requires the obtaining of a form from the buyer of the marihuana, NOT FROM THE GOVERNMENT. Section 4742(a) does not require that a prospective or past seller inform the United States of anything.

VI

CONCLUSION

For the above stated reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Ronald S. Morrow
RONALD S. MORROW

